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No. 96-1569

In the Supreme Court of the United States

October Term, 1997

MARILYN RODERICK, AND DANIEL BOGAN,
Petitioners,

v.

JANET SCOTT-HARRIS,
Respondent.

AMICUS CURIAE BRIEF

On Behalf of the City of Fall River, Massachusetts

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INTEREST OF THE AMICUS CURIAE

Facing the reality of a ten percent cut in local aid from the State, acting Mayor Daniel Bogan asked the City Administrator for alternative plans to deal with the impending fiscal constraints. One

plan was suggested by the plaintiff; among other savings she suggested reducing the number of hours that nurses would be available in the schools and senior centers in the City. The plan Bogan settled upon resulted in the elimination of 135 positions, 27 of which were occupied. One of those positions was the Plaintiffs.[1]

Before being able to present a budget to the City Council for passage, Bogan was required to eliminate any positions in City ordinance. Otherwise, he would be forced to finance those positions for the coming fiscal year. And thus, no savings would be realized. Bogan did this. The committee on ordinances, which Councilor Marilyn Roderick chaired, reported favorably on the elimination of the position. Later the City Council passed the budget which entailed eliminating the positions noted above. And Bogan signed it. The hallmark of a "traditional legislative function" is its creation of prospective, legislative-type policies rather than the quotidian task of applying existing policy." *See Prentiss v. Atlantic Coastline Co.*, 211 U.S. 210, 226 (1908)("Legislation ... looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.")

Bogan and Roderick have tried to assert their absolute immunity from the inception of this litigation. Now, saddled with

[1] Albeit at a lower salary, the Plaintiff was the only individual offered another position.

considerable financial burdens and personal reserves depleted, they stand before the United States Supreme Court still asserting their absolute immunity. The City's interest is simple; if a budget is passed which results in any attrition, how much additional money should be appropriated to the Law Department? And, how much time should a local legislator expect to spend litigating as opposed to legislating?

SUMMARY OF ARGUMENT

This case involves two local elected officials performing a purely legislative function; a councilwoman voting on passage of a city ordinance and a mayor completing the legislative process by signing the city ordinance. The enactment of budgetary items is a fundamental part of the legislative process and local officials performing this legislative function should be granted absolute immunity. Without such immunity local legislators would avoid the tough call, the controversial issues, for fear of the threat of litigation and the costly reality of defending oneself. *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S.719, 732 (1980).

This Court has found absolute immunity for each legislative level presented to it. *See Kilbourn v. Thompson*, 103 U.S. 168, 202-204 (1880)(federal level), *Tenney v.Brandhove*, 341 U.S. 367,

379 (1951)(state level); *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391,406 (1979)(regional level). A local legislator and local legislative acts deserve the same protections afforded to those at the regional, at the state, and at the federal levels. To do otherwise is to decide that local legislators are a lesser form of representative. In granting absolute immunity the Court should look to the function of the act rather than the status or level at which the official serves. Roderick's vote in passage of the city ordinance and Bogan's signature upon the ordinance are quintessential legislative functions. As long as the act is legislative it does not matter who performs it. *See Lake Country, supra*, 440 U.S. at 404-405.

The City's interest in this case is to ensure the proper operation of government. To that end, it requires the recognition that local legislators and local legislative acts need the protection afforded to other legislators. To promote free debate and the proper operation of government a legislator must act for the City's good, not for fear of his or her harm.

The decision of the First Circuit in this case, while claiming to give absolute immunity to local officials, actually affords them a standard of qualified immunity and moreover, a qualified immunity that has a subjective standard. If allowed to stand the decision of the First Circuit would have a chilling effect upon the local

legislative process. And, it is not unreasonable to believe that otherwise qualified candidates would think better of seeking local elective office. To avoid such a result this Court should extend absolute immunity to local officials for acts performed within the parameters of the legislative process.

ARGUMENT

I. FEDERAL, STATE, AND REGIONAL LEGISLATORS WHO PERFORM LEGISLATIVE FUNCTIONS ARE ENTITLED TO ABSOLUTE IMMUNITY. THIS REASONING IS NO LESS APPROPRIATE FOR LOCAL ELECTED OFFICIALS.

The concept of immunity is neither novel nor new. This Court has long recognized the doctrine of state immunity set forth in the Eleventh Amendment. This Court's decisions regarding Eleventh Amendment sovereign immunity recognize the "respect owed [the States] as members of the federation." *Puerto Rico Aqueduct and Sewer Authority v Metcalf & Eddy, Inc.*, 506 U.S. 139, 146,(1993). Although not directly applied to counties, *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 280(1977), Eleventh Amendment immunity has been extended to counties where a judgment against them would impact the State treasury. *See, e.g., Edelman v. Jordan*, 415 U.S. 651 (1974)(Eleventh Amendment bars suit against state and county officials for retroactive award of welfare benefits).

The doctrine of immunity also exists in the common law. *Spallone v United States*, 493 U.S. 265, 278 (1990). "[T]he immunity of legislators from civil suit for what they do or say as legislators has its taproots in the parliamentary struggles of 16th- and 17th-century England; such immunity was consistently recognized in the common law and was taken as a matter of course by our Nation's founders." *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 403 (1979).

Further, federal legislative immunity exists in the Speech or Debate clause. *Powell v. McCormack*, 395 U.S. 486, 503 (1969)("[T]he legislative immunity created by the Speech or Debate Clause ... insures that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation."). Thus, legislative immunity exists statutorily, constitutionally, and by common law. Indeed, "[i]t was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution." *Tenney*, 341 U.S. at 372. The Civil Rights Act did not abrogate this sovereign immunity. *Tenney* 341 U.S. at 376.

Immunity exists not as a shield for scoundrels, but as a sword for the public good. This Court's decisions have recognized that without immunity, the peoples' right to representation is

undermined. *Lake Country, supra*, 440 U.S., at 404-405, *Tenney, supra*, 341 U.S. at 377.[2] Without immunity legislators would avoid the tough call, the controversial issues, for fear of the threat of litigation and the costly reality of defending oneself. *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 732 (1980).

The threat of litigation will now become a part of the democratic process and by doing so, will distort it. At the very least, it will distract the legislators. *See Tenney*, 341 U.S. at 377 (affording absolute immunity to legislators obviates the fear that they will be "subjected to the cost and inconvenience and distractions of a trial"). It is not merely the possible result of the litigation that is feared; it is also the prospect of having to defend oneself. *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967).

If a legislative scoundrel exists, granting legislative immunity does not remove the significant checks against him or her. If a

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[2] As Justice Frankfurter wrote:

> The reason for the privilege is clear. It was well summarized by James Wilson, an influential member of the Committee of Detail which was responsible for the provision in the Federal Constitution. "In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense." II Works of James Wilson (Andrews ed. 1896) 38.
>
> Tenney, 341 U.S. at 373.

proper suit lies, it can lie against the municipality which does not have immunity. *See Lake Country Estates*, 440 U.S. at 405 n.29 (*citing Monell v. New York City Dep't of Social Serv.*, 436 U.S. 658, 663 (1978); *Aitchinson v. Raffiani*, 708 F. 2d 943, 953 (3d Cir. 1983) (an action can still lie against a municipality regardless of the legislator's absolute immunity). If a real scoundrel appears a criminal remedy exists for willful deprivations of constitutional rights under color of state law. 18 U.S.C. sec. 242. *Imbler v. Pachtman*, 424 U.S. 409, 429 (1975); see *United States v. Gillock*, 445 U.S. 360, 372 (1980)(no authority for extension of official immunity to criminal cases). Perhaps, the most appropriate check in a vital democracy is that of the ballot box. *See Tenney, supra*, 341 U.S. at 378 ("In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the places for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses."); *see also, e.g., Rateree v. Rockett*, 852 F. 2d 946, 951 (7th Cir. 1988)("one recourse in dealing with legislators who hide behind their shield of immunity and vote 'improperly' is of course, a resort to the ballot box.").

Further, this Court has determined that at some point the need for absolute immunity outweighs the potential harms attendant to it.

See Pierson v. Ray, 386 U.S. 547 (1967)(absolute immunity for judges), *Imbler v. Pachtman*, 424 U.S. 409, 428 (1975)(in a case involving absolute immunity for prosecutors, the Court found that it is "better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation").

There are myriad examples of how this immunity has been applied. In the Legislative context, this Court has seen fit to determine that only absolute immunity would be the proper standard. *Tenney, supra*, 341 U.S. at 399. Further, with each legislative level presented to it, this Court has found absolute immunity. *See Kilbourn v. Thompson*, 103 U.S. 168, 202-204 (1880)(federal level); *Tenney*, 341 U.S. at 379 (state level); *Lake Country Estates*, 440 U.S. at 406 (regional level). It is the similarity of the function that prompted similar treatment. 440 U.S. at 406. Given the Court's analysis that the Speech and Debate clause cloaks legislators only when acting in their legislative capacity, the Court has fashioned a functions test. *Forrester*, 484 U.S. at 222; *see also Buckley v. Fitzsimons*, 509 U.S. 259, 269 (1993).

Legislators who act outside of legislative parameters are entitled to no greater immunity than that of the executive branch: qualified immunity. But just as a legislator is treated differently when he or she acts non-legislatively, so too is an executive officer who acts

non-executively. If an executive officer acts legislatively, he should be afforded the same treatment as a legislator. *Cf. Butz v. Economou*, 438 U.S. 478 (1978)(Although involving a Bivens action and not a sec. 1983 action, the court applied the same reasoning for immunity analysis and recognized absolute immunity for individuals performing judicial and prosecutorial functions within the Department of Agriculture), *Supreme Court of Virginia*, 446 U.S. at 734 (Virginia Supreme Court Judges entitled to the absolute immunity afforded a legislator because they were essentially functioning as legislators).

The protections afforded elected officials can be seen as an umbrella; they shield such individuals, but only if they are acting in a legislative fashion. The umbrella though wide, is not all encompassing. There are only limited instances in which an executive acts legislatively. Such an instance exists here. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (No complete separation of powers within Constitution as "[t]he President is a participant in the law-making process by virtue of his authority to veto bills enacted by Congress."); *Edwards v. United States*, 286 U.S. 482, 491 (1932)(President's signing into law of bill passed by Congress is a legislative act). The Fifth Circuit has specifically addressed this issue:

> "The mayor's veto, like the veto of the President or a state governor, is undeniably a part of the

> legislative process. It differs only that it takes place at the local level. When the mayor exercises his veto power, it constitutes the policy-making decision of an individual elected official. It is as much an exercise of legislative decision making as is the vote of a member of Congress, a state legislator, or a city councilman."

Hernandez v. City of Lafayette, 643 F. 2d 1188, 1194 (1981).

Roderick's vote was necessary in order to pass the municipal budget. Bogan's endorsement was necessary in order to complete the legislative process. Without the votes from the Council no budget could pass. Without the Mayor's endorsement no budget could take effect. To permit disparate treatment of the parties here puts form over substance. Although the status of the individual is significant, it is not controlling. It is the function of the act, not the title of the actor that determines the proper level of immunity available. *Harlow v. Fitzgerald*, 457 U.S. 800, 810,(1982)("... in general our cases have followed a 'functional' approach to immunity law); *see Wood v. Strickland*, 420 U.S. 308, 322 (1975)(where this Court applied a function test in determining that a local school board would be entitled to only qualified immunity as they were applying disciplinary policy to a particular individual as opposed to legislating the policy). This Court has found immunity for legislators only when they are performing their legislative function. *See, e.g. Eastland v. United States Servicemen's Fund*,

421 U.S. 491, 95 S. Ct. 1813, 44 fL. Ed. 2d 324 (1975). And, for judges when they are performing an adjudicatory function. *See, e.g. Stump v. Sparkman*, 435 U.S. 349 (1978). Further, absolute immunity has been extended to the Executive Branch. And this extension has gone well beyond its application to the Presidency. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). Prosecutors and others similarly situated receive absolute immunity; as do executives who perform adjudicatory functions. *Butz, supra.* The extension of immunity here is premised on the acts, not the actor, for this Court has made clear that qualified immunity is the norm for executives. *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

II. LESS THAN ABSOLUTE IMMUNITY WILL SERIOUSLY IMPAIR A CITY'S ABILITY TO GOVERN.

The city is not arguing that an executive should receive absolute immunity for his or her executive actions, for the city recognizes that the greater power inherent in the Executive "affords a greater potential for a regime of lawless conduct." *Butz, supra*, 438 *at* 506. What the city is arguing is that where, as here, the Executive is merely playing a role in completing a quintessentially legislative process, he should be afforded the same protections given to the Legislature. This comports with the function analysis generally used by this Court. *See Gravel v. United States*, 408 U.S. 606, 625

(1972)("[S]enators and their aides were absolutely immune only when performing 'acts legislative in nature,' and not when taking other ~~acts~~ even 'in their official capacity."; *See e.g. Supreme Court of Virginia, supra*, 446 U.S. at 731-737(judges).

This Court has seen fit to extend absolute immunity to Congress, to State Legislators, and to regional legislators. *Lake Country, supra*, 440 U.S. at 404 - 405. There is no sensible line of demarcation between a regional legislator and a municipal one. To suggest one, prompts the query; what liability would *Mr. Smith* have faced if he decided to legislate at home and not go to Washington?

If the premise that Congressmen need the protection of absolute immunity is sound, than its application to local legislators is equally sound. "Freedom of speech and action in the legislature [is] taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation." *Tenney, supra*, 341 U.S. at 372. The city officials here come from a long state history of freedom of speech in the Legislature:

> "In perhaps, the earliest American case to consider the import of the legislative privilege, the Supreme Judicial Court of Massachusetts, interpreting a provision of the Massachusetts Constitution granting the rights of freedom of speech and debate to state legislators, recognized that the privilege secured by it is not so much the privilege of the house as an organized body, as of each individual

> member composing it, who is entitled to this privilege, even against the declared will of the house. For he does not hold this privilege at the pleasure of the house; but derives it from the will of the people ..."

Spallone, supra at 379, (*quoting Coffin v. Coffin*, 4 Mass. 1, 27 (1808).

The Legislature and legislative acts can be untidy affairs, saddled with a fair degree of acrimony. This is no less so at the local level. *See Gorman Towers, Inc. v. Bogoslavsky,* 626 F. 2d, 606, 612(1980) ("Because municipal legislators are closer to their constituents than either their state or federal counterparts, they are, perhaps, the most vulnerable to and least able to defend lawsuits caused by the passage of legislation.")(*quoting Lagon v. Maryland*, 448 F. Supp. 935, 947 (D. Md. 1977).

A local legislator and local legislative acts deserve the same protections afforded to those at the regional, at the state, and at the federal levels. To deny these protections here, given the rationale for their existence at the other levels, is to decide that local legislators are a lesser form of representative. It is to say that they are not only different in degree, but are also somehow different in kind. And, so different that even though they face the same perils as those on the regional, on the state, and on the federal level, they are to be separated from these groups and left to fend with what

has already been determined to be an insufficient level of protection for legislators: qualified immunity.

To now apply a literalist approach and determine that as the Speech or Debate Clause does not mention local legislators, they should not be given absolute immunity, is to call into question the precedent which exists for absolute immunity for acts outside Congress, and the absolute immunity for congressional aides. *See Harlow, supra*, 457 U.S. at 823. Further, the absence of express provisions regarding local legislators and the dearth of such early common law may be attributed to a very simple cause; "the paucity of early legal actions against local legislators for legislative acts was due to relatively few early local legislative bodies and undeveloped jurisprudence." *Bruce, supra,* 631 F. 2d at 277.

The logic that supports absolute immunity for local legislators applies equally well to a local executive performing legislative acts. As long as the act is legislative it does not matter who performs it. *See Lake Country, supra*, 440 U.S. at 404 - 405,(where a hybrid board of executive and legislative individuals were afforded absolute immunity).

The adoption of 42 U.S.C. 1983 did not abrogate common law legislative immunity. *Tenney, supra*, 371 U.S. at 377. While some may ask what becomes of the plaintiff if absolute immunity applies here. The city answers: the same thing that would happen to such a

plaintiff poised against a regional group, a state legislature, and Congress.

The City's interest in this case is simple: to ensure the proper operation of government. To that end, it requires the recognition that local legislators and local legislative acts need the protections afforded to other legislators. To promote free debate and the proper operation of government a legislator must act for the city's good, not for fear of his or her harm. To deny immunity is to encourage those acting legislatively to act with the narrow view of private monetary concerns, and not with the more appropriate focus - that of the public's needs. *Spallone, supra*, 493 U. S. at 280.

The First Circuit's opinion does not guide a City. To find that the passage of a municipal ordinance necessary to complete the budget process is not a legislative act, is to misperceive the legislative process. See Mass. Gen. L. Ann. ch. 43, sec. 55 (1994), Mass. Gen. L. Ann. ch 44 sec. 32 (1994). To further find that although absolute immunity was appropriate here, it was correctly applied post trial, is to misperceive the point of absolute immunity. Absolute immunity is to be raised at the earliest stages of litigation for the immunity is not just from any judgment, but from the burden of having to defend oneself. *Supreme Court of Va.,supra*, 446 U.S. at 731-32, *Dombrowski,supra*, 387 U.S. at 85 ("legislators engaged in the sphere of legitimate legislative activity should be protected

not only from the consequences of litigation's results but also from the burden of defending themselves"). A city in the First Circuit is now instructed that the statutorily mandated passage of a municipal budget is not a legislative act. It is further instructed that if any of its elected officials wish to assert absolute immunity they may do so, but only after trial. This is no guidance at all.

But, most chilling to a City is the First Circuit's pronouncement that they have effectively eschewed a functions test in favor of a motivations test. A City can now look forward to discovery and litigation around the motivations of individual municipal officials. Justice Scalia, in a case involving different issues than those presented today opined on the futility of venturing to find the sole motivation of an individual legislator:

> But the difficulty of knowing what vitiating purpose one is looking for is as nothing compared with the difficulty of knowing how or where to find it. For while it is possible to discern the objective "purpose" of a statute (i.e. the public good at which its provisions appear to be directed), or even the formal motivation for a statute where that is explicitly set forth (as it was, to no avail, here), discerning the subjective motivation of those enacting the statute is to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed even finite. In the present case, for example, a particular legislator need not have voted for the Act either because he wanted to foster religion or because he wanted to

> improve education. He may have thought the bill would provide jobs for his district, or he may have wanted to make amends with a faction of his party he had alienated on another vote, or he may have been a close friend of the bill's sponsor, or he may have been repaying a favor he owed the Majority Leader, or he may have hoped the Governor would appreciate his vote and make a fundraising appearance for him, or he may have been pressured to vote for a bill he disliked by a wealthy contributor or by a flood of constituent mail, or he may have been seeking favorable publicity, or he may have been reluctant to hurt the feelings of loyal staff members who worked on the bill, or he may have been settling an old score with a legislator who opposed the bill, or he may have been mad at his wife who opposed the bill, or he may have been intoxicated and utterly *un*motivated when the vote was called, or he may have accidentally voted "yes" instead of "no," or, of course, he may have had (and very likely did have) a combination of some of the above and many other motivations. To look for *the sole purpose of* even a single legislator is probably to look for something that does not exist.

Edwards v. Aguillard, 482 U.S. 578, 637 (1987)(Scalia, J., dissenting)

The First Circuit has now decided a case which calls into question a very basic tenet of our democracy. As Justice Frankfurter wrote, "it is not consonant with our scheme of government for a court to inquire in to the motives of legislators."

Tenet, 341 US at 377 (citing *Flatter*, 6 Crunch at 130). Individual motivations are irrelevant to an absolute immunity inquiry. *Id.*

Further, the First Circuit while claiming to give absolute immunity to municipal officials actually affords them a standard of qualified immunity and moreover, a qualified immunity that has a subjective standard. Effectively, the First Circuit has returned to the pre-*Harlow* standard. *Harlow v. Fitzgerald*, 457 U.S. 800 (1981). And, it did so contrary to the guidance of this Court. *See Dombrowski*, *supra*, 421 U.S. at 508-509, *Tenney*, 341 U.S. at 377.

When the Court last addressed this issue, it found absolute immunity for regional legislators. *Lake Country*, *supra*, 440 U.S. at 404-405. And, more recently, in *Spallone*, supra, 493 U.S., at 406, it reserved the question. *Lake Country* proves illustrative on two levels. One, it applied absolute immunity to regional legislators. And two, the regional legislative board that it applied absolute immunity to was a hybrid of legislative and executive members. This case is the logical next step to *Lake Country*. Since *Lake Country*, the Courts of Appeals have unanimously held that local legislators are entitled to absolute legislative immunity." *See, e.g., Fry v. Board of City Commissioners*, 7 F. 3d 936, 942 (10th Cir, 1993); *Acevedo-Cordero v. Cordero-Santiago*, 958 F. 2d 20, 22 (1st Cir. 1992); *Goldberg v. Rocky Hill*, 973 F. 2d 70 (2d. Cir. 1992)(dicta); *Gross v. Winter*, 876 F. 2d 165, 169 (D.C.Cir. 1989);

Haskell v. Washington Township, 864 F. 2d 1266, 1277 (6th Cir. 1988);*Aitchison*, 708 F. 2d at 98-99; [3]*Reed v. Shorewood*, 704 F. 2d 943, 952-953 (7th Cir. 1983); *Espanola Way Corp. v. Meyerson*, 690 F. 2d 827, 829 (11th Cir. 1982), *cert denied*, 460 U.S. 1039 (1983); *Kuzinich v. County of Santa Clara*, 689 F. 2d 1345, 1349-1350 (9th Cir. 1982); *Hernandez v. Lafayette*, 643 F. 2d 272, 274-280 (5th Cir. 1980), *cert. denied*, 455 U.S. 907 (1982); *Bruce v. Riddle*, 631 F 2d 272, 279 (3rd Cir. 1980);*Gorman Towers, Inc. v. Bogoslavsky*, 626 F. 2d. 607, 611-614 (8th Cir. 1980). That it is the rule in the circuits that absolute immunity is afforded local legislators for their legislative acts supports the City's position. SHELDON H. NAHMOD, Civil Rights and Civil Liberties Litigation, 14 (1991).

Without clear, sensible guidelines a City's democracy is distorted. The ramifications are serious, particularly given the impact they will have on the City's budget. "Ordering budget priorities is a complex process subject to many pressures and resulting in many compromises. Budgets are written to the clangor of many axes grinding ... Each line item in a budget may affect the interests of a few people intensely, but a budget expresses general policy by balancing the competing claims of hundreds of thousands

[3] In Aitchison, a case factually similar to this one, the Court found that the mayor could exercise legislative powers along with his traditional executive duties. *Aitchison at 99.*

of line items." *Rateree v. Rockett*, 630 F. Supp. 763, 771 (N.D. Ill, 1986), aff'd, 852 F. 2d 946 (7th Cir. 1988). Given the First Circuit's decision it is not unreasonable to believe that any intelligent, qualified individual would think better of seeking elective office. *Harlow, supra,* 457 U.S. at 817. Municipal office should be sought by more than just the judgment proof.

CONCLUSION

For the foregoing reasons, the Amicus Curiae respectfully requests that this Court hold that local officials are entitled to absolute immunity for those actions that are quintessentially legislative. The Amicus Curiae respectfully requests that the judgments against these individual defendants be reversed and vacated.

Dated: August 12, 1997

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